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No. 98-495

In the Supreme Court of the United States

OCTOBER TERM, 1998

EDWARD A. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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6 pp

QUESTION PRESENTED

Whether the district court's failure to instruct the jury on the materiality element of the federal false statement statute, 18 U.S.C. 1001, was harmless error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 139 F.3d 1359.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B2) was entered on April 28, 1998. A petition for rehearing was denied on June 25, 1998 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on September 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to commit offenses against

the United States, in violation of 18 U.S.C. 371; two counts of making a false statement on a matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. 1001 (1994); and one count of exporting defense-related materials from the United States without obtaining the required license, in violation of 22 U.S.C. 2778. He was sentenced to 41 months' imprisonment and ordered to pay a fine of $25,000. The court of appeals affirmed. Pet. App. A1-A15.

1. The Arms Export Control Act, 22 U.S.C. 2778(a)(1), authorizes the President to designate a list of defense-related articles, known as the "Munitions List." Articles on that list may not be exported from the United States without a license from the Department of State. 22 U.S.C. 2778(a)(1). Defense-related articles that have non-military applications, known as "dual use" items, may be exported from the United States with an export license from the Department of Commerce. 22 C.F.R. 120.3-120.4 (1985).

Zirconium is a rare metal with incendiary properties. Pet. App. A3. Compacted zirconium, which is specifically designed for use in cluster bombs, is listed on the Munitions List and requires a State Department license for export. Gov't C.A. Br. 2-3. Powder and sponge zirconium are dual use items, the export of which is licensed by the Department of Commerce. *Id.* at 3.

Petitioner was an ordnance sales manager for Teledyne Wah Chang Albany (TWCA), an American manufacturing company. In 1982, petitioner received orders from Carlos Cardoen, an international arms dealer in Chile, for zirconium sponge compacts. When TWCA requested an end-use statement for the zirconium, Cardoen's company submitted a statement falsely stating that the zirconium would be used as a booster material in industrial explosives sold to the mining

industry. TWCA then sought a ruling from the Department of State Office of Munitions Control (OMC) on whether zirconium was on the Munitions List. TWCA explained that it wished to export zirconium for use in industrial explosives. In 1983, OMC ruled that because zirconium was a dual use item, it was excluded from the Munitions List. After receiving that ruling, TWCA applied for licenses from the Department of Commerce to export zirconium to Cardoen. To obtain those licenses, TWCA submitted the false end-use statements that it had obtained from Cardoen. After receiving the licenses, TWCA exported 134 tons of zirconium compacts worth $3.5 million to Cardoen, who used them to produce cluster bombs that he sold to Iraq for use during the Iraq-Iran war. Pet. App. A3-A5; Gov't C.A. Br. 3-4, 13.

Petitioner was Cardoen's primary contact at TWCA for the zirconium orders, and he negotiated pricing and shipping arrangements on behalf of TWCA. Pet. App. A4. During the course of the conspiracy, petitioner visited Cardoen's arms factory in Chile and took with him zirconium samples specifically designed for use in cluster bombs. Gov't C.A. Br. 5. On several occasions, petitioner admitted that he knew that the end-use statements were false and that the zirconium compacts were being used to manufacture Iraqi cluster bombs. *Id.* at 6-7; Pet. App. A5. Petitioner continued to process Cardoen's orders for weapons-grade zirconium after making these statements. Gov't C.A. Br. 7-8.

2. The false end-use information provided to the Department of Commerce formed the basis for the counts of the indictment charging that petitioner had made materially false statements to an agency of the United States, in violation of 18 U.S.C. 1001 (1994). At trial, petitioner proposed two conflicting jury instruc-

tions on the materiality of the statements allegedly made in violation of that statute. One instruction set forth the principle, then settled under Eleventh Circuit law, that materiality was an issue for the court, not the jury. Another proposed jury instruction, however, would have required the jury to decide whether the alleged false statements were material. Gov't C.A. Br. 48-49. The district court ruled that materiality was a question for the court and instructed the jury that the alleged false statements were material. Pet. App. A6.

3. After petitioner's trial, this Court held in *United States* v. *Gaudin*, 515 U.S. 506 (1995), that the Fifth and Sixth Amendments require the materiality element of a Section 1001 offense to be submitted to the jury for determination. Although the court of appeals found *Gaudin* applicable to petitioner's case, it held that the error in the jury instructions was harmless because no reasonable jury could have found that petitioner's false statements were not material. Pet. App. A7. The court first stated that a statement is material if "it has a natural tendency to influence or the capability to influence government action." *Ibid.* The court rejected petitioner's argument that "the false statements would have been incapable of influencing the government due to the CIA's covert interest in assisting the Iraqi war effort." *Ibid.* The court held that defendants cannot "defeat the materiality requirement by claiming that their falsehoods were consistent with unwritten government policy." *Ibid.* The court then held that "[b]ecause the plain meaning of the false end-use statements would influence the Commerce Department in deciding whether or not to grant the export licenses they were clearly material." *Id.* at A8.

DISCUSSION

Petitioner contends (Pet. 3-15) that the court of appeals erroneously held that the district court's failure to allow the jury to consider whether the charged false statements were material can be harmless error. On October 13, 1998, this Court granted certiorari in *Neder* v. *United States*, No. 97-1985, on two questions, one of which is whether the failure to instruct the jury on the materiality element of a federal offense can be harmless error when materiality is not in dispute at trial. The Court's resolution of that issue in *Neder* is likely to have a direct effect on the validity of the court of appeals' disposition of petitioner's case. Accordingly, the Court should hold this petition pending the disposition in *Neder*.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of *Neder* v. *United States*, No. 97-1985.

Respectfully submitted.

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